91-60

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

DESPINA SMALIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF PENNSYLVANIA

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112 pgs.

QUESTION PRESENTED FOR REVIEW

When the completion of a nonjury criminal trial is stayed so that the prosecution can appeal an insufficiency ruling that disposes of some but not all of the charges, and that ruling, after some five and a half years of appellate proceedings, is held by Your Honorable Court to be an unappealable acquittal, does the resumption of trial on the remaining charges (as presently proposed by the prosecution) offend the Double Jeopardy Clause?

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The opinion of the Supreme Court of Pennsylvania (1991 Pa. LEXIS 108) has not yet been published. The opinion of the Superior Court of Pennsylvania is published at 375 Pa. Super. 601, 545 A. 2d 284.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered May 9, 1991. Your Honorable Court has jurisdiction to review said judgment by writ of certiorari by virtue of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

Together with her husband, Ernest Smalis, petitioner was charged with criminal homicide (two counts), recklessly endangering another person (two counts), causing catastrophe, and failure to prevent catastrophe. Petitioner alone was charged with securing execution of documents by deception. The charges arose out of a fire that occurred February 12,

1979 in a Pittsburgh building owned by petitioner and her husband.[1]

Nonjury trial began on November 12, 1980. The last of the prosecution witnesses concluded his testimony on December 10, 1980. On December 15, 1980, after several stipulations were placed on the record, the prosecutor rested. On December 17, 1980, the defendants demurred to the evidence. On December 19, 1980, the trial court sustained the demurrers with respect to murder, voluntary manslaughter, and causing catastrophe, finding that as a matter of law there was insufficient evidence to link the defendants to the setting of the fire.

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[1]The Smalises were also charged with arson and related offenses as a result of a 1977 fire in a restaurant they owned. With respect to those charges, petitioner's demurrer to the evidence was sustained and no appeal was taken from that ruling. Mr. Smalis' demurrer was denied and the case proceeded to verdict.

Demurrer was denied as to the remaining charges.

The Commonwealth appealed the orders the same day. On December 22, 1980, the defendants sought to withdraw their demurrers and to consent to the reinstatement of the murder charges in order to avoid the interruption of the trial.[2] They joined in a Commonwealth motion for reconsideration.

Petitioner's husband told the trial court:

> Your Honor, if my wife and I had any part alleged in the two fires, I would ask Mr. Livingston to give us not only time but appeals and legal technicalities. We are ready to go to court. This has been going on for two years. I'm sorry, but I'm a very emotional man. Not only has it killed my

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[2]The Commonwealth orally requested a stay with respect to the remaining charges in the course of the same discussion. December 22, 1980 proceedings at 8-9.

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> business, but my children are very, very severed [sic] about this. I can't go on. I'm ready to go to trial. [December 22, 1980 proceedings at pages 14-15.]

Petitioner concurred:

> I just want to be able to sleep at nights. I want it over with. . . . I am doing this because we have nothing to hide, sir, nothing at all. . . . I am doing this for myself and my two children and that's all. [December 22, 1980 proceedings at page 28.]

The Commonwealth took the position that reinstatement of the charges after reconsideration on the merits was appropriate but that such reinstatement based on the consent of the defendants was not, unless, perhaps, the defendants were willing to stipulate to the sufficiency of the evidence, which they were not.[3] One of the trial prosecutors stated:

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[3]December 22, 1980 proceedings at pages 18, 33.

> By now trying to totally withdraw the motion for demurrer, the defendants are attempting to circumvent the Commonwealth's legitimate right to have the issues litigated at the appellate level so as to provide for the ultimate determination which is for the fact finder to know, is this evidence sufficient? [December 22, 1980 proceedings at page 30.]

The lead trial prosecutor concurred:

> [W]hat the defendants seem to be offering looks good, but it is not in fact when you begin to examine the realities of it. It is not the same thing, for example, as an appellate opinion. [December 22, 1980 proceedings at pages 39-40.]

The court granted reconsideration on the merits and entertained arguments on the merits on January 5 and January 8, 1981. Defendants declined to offer any argument on the merits.[4] The court reaffirmed its earlier decisions on the

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[4]January 5, 1981 proceedings at page 43-45.

demurrers, and, over defense objection[5], orally granted a stay of proceedings on all charges arising out of the 1979 fire pending disposition of the appeals.[6] The following day, January 9, 1981, the Commonwealth filed a second batch of appeals from the orders on reconsideration, together with corresponding stay motions which asserted that the completion of the trial with respect to the charges that survived the demurrer would create collateral estoppel problems in the event of the appellate reversal of the order sustaining the demurrer. 56-60a infra. The court

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[5]Petitioner's counsel stated:

> For the record, I would object to any aborting of this trial both on due process and double jeopardy grounds. I believe my client has a right to have this trial proceed to verdict without being interrupted by the appellate process.

January 8, 1981 proceedings at page 67.

[6]January 8, 1981 proceedings at page 72.

entered a written stay order the same day. 61-63a infra. The appeals were consolidated.

Petitioner filed a Motion to Quash Appeal and a Petition for Preliminary Disposition of Motion to Quash with the Superior Court of Pennsylvania on February 17, 1981. The Commonwealth opposed both motions. On May 11, 1981, the Motion to Quash was denied without prejudice to petitioner's right to raise the issue of appealability in her brief; the Petition for Preliminary Disposition was denied as moot.

On July 8, 1983, after briefing and argument, a Superior Court panel quashed the appeals on double jeopardy grounds. The Commonwealth successfully sought reargument, which resulted in an en banc decision, entered June 29, 1984, affirming the panel's decision to quash.

Commonwealth v. Smalis, 331 Pa. Super. 307, 480 A. 2d 1046 (1984).

The Commonwealth then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. The petition was granted and the case was consolidated with a case in which the Superior Court had quashed a Commonwealth appeal on the basis of the panel decision in the instant case. Commonwealth v. Zoller, 318 Pa. Super. 402, 465 A. 2d 16 (1983). On March 29, 1985, the Supreme Court of Pennsylvania reversed the decision quashing the appeals, remanded the instant case to the Superior Court for consideration of the merits of the appeals, and remanded the Zoller case to the Court of Common Pleas of Beaver County for a new trial, the Superior Court having found that the order sustaining the demurrer in that case was erroneously entered before it found that the appeal

was barred. Commonwealth v. Zoller, 507 Pa. 344, 490 A. 2d 394 (1985). Reargument was sought by the Smalises and was denied on June 11, 1985.

Your Honorable Court granted a writ of certiorari and held, in a decision rendered May 5, 1986, that the Commonwealth's appeal was barred by the Double Jeopardy Clause. Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

Following remand, the Supreme Court of Pennsylvania entered a per curiam order on July 29, 1986, reinstating the Superior Court order quashing the appeals. Commonwealth v. Smalis, 511 Pa. 229, 512 A. 2d 634 (1986). The record was returned to the Court of Common Pleas on September 17, 1986. The Commonwealth seeks to resume the trial.

A Motion to Dismiss Charges, based on the Double Jeopardy Clause, the Due

Process Clause, and the Confrontation Clause, was filed December 12, 1986.[7] 64-67a infra. A similar motion was filed on behalf of petitioner's husband; his motion also raised a speedy trial claim.[8] The motions were denied January 9, 1987. 54-55a infra. The Superior Court appeal at No. 71 Pittsburgh, 1987 was taken as of right and challenged the order on double jeopardy grounds; the appeal at No. 1546 Pittsburgh, 1987 was taken by permission

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[7]Petitioner's due process argument below was that the Confrontation Clause contemplates that the verdict will be rendered at a time when the confrontation is fresh in the mind of the factfinder, and that a resumed trial would accordingly be an inherently unfair one. Petitioner recognizes that sufficient finality does not exist with respect to the due process issue to confer jurisdiction on Your Honorable Court, and her request for certiorari is accordingly limited to the double jeopardy issue.

[8]Petitioner has not, to date, raised a speedy trial claim. The implications in the opinions below to the contrary are erroneous.

following certification of the issues other than double jeopardy.[9] Two corresponding appeals were taken on behalf of Ernest Smalis.

The Superior Court affirmed the orders on June 2, 1988. Commonwealth v. Smalis, 375 Pa. Super. 601, 545 A. 2d 284 (1988). Ernest Smalis sought no further review; petitioner filed an Application for Reargument. It was denied August 5, 1988. A Petition for Allowance of Appeal was granted by the Supreme Court of Pennsylvania on June 2, 1989. On May 9, 1991, that court affirmed the orders and held, in an opinion authored by Mr. Justice McDermott, that resumption of trial was constitutionally permissible. Mr. Justice Zappala, in an opinion joined

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[9] 42 Pa.C.S. 702(b) permits certification of interlocutory orders when their immediate review will advance the ultimate resolution of a matter. The certification, of course, is only effective for purposes of state appellate review.

by Mr. Justice Larsen, dissented, taking the position that the Double Jeopardy Clause of the Pennsylvania Constitution barred further proceedings.

REASONS FOR GRANTING THE WRIT

This is the second mid-trial appeal and the second mid-trial certiorari petition in this case. The issue this time is the effect of the delay caused by the first appeal on petitioner's double jeopardy rights with respect to charges that were not directly involved in that appeal but whose disposition was stayed pending its outcome. That outcome was that Your Honorable Court held that the order appealed from -- a mid-trial ruling that the evidence was insufficient to prove several of the charges -- was an unappealable acquittal on those charges.

It is the position of the Commonwealth and of a majority of the

Supreme Court of Pennsylvania that the trial may simply pick up where it left off in January 1981 -- the trial judge is available -- and that this procedure obviates any double jeopardy problem. It is the position of the petitioner that such resumption would constitute an impermissible second jeopardy, and that it is, as the dissent below put it, "facetious" to say that a resumption would not be a successive prosecution. 21a infra.[10]

It is also the position of the petitioner that the honest[11] but

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[10]The dissent was based on Article I, §10 of the Pennsylvania Constitution, a provision petitioner did not expressly invoke in her motion to dismiss. 67a infra. The language of that Clause is quoted at 21a infra and is all but identical to the federal Double Jeopardy Clause.

[11]The Superior Court's attribution to petitioner of a claim that the prosecutor engaged in a "frivolous delaying tactic", 375 Pa. Super. at 606, 545 A. 2d at 286, 31a infra, is inaccurate.

unreasonable[12] belief of the trial prosecutor that he had the right to interrupt the trial to take the first appeal is of no constitutional significance; as the dissent below put it:

> Whatever the practice in the Commonwealth may have been in November, 1980, the double jeopardy clause may not be reshaped to accommodate the Commonwealth's reliance on that practice. The double jeopardy clause protects the accused. It may not be reinterpreted to

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[12]In Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90 L. Ed. 2d 116 (1986), hereinafter Smalis I, your Honorable Court stated:

> What the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt. [Footnote omitted.] Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause. [Citations omitted.] United States v. Scott[, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978)] . . . plainly indicates that the category of acquittals includes "judgment[s] by the court that the evidence is insufficient to convict." [Citation and footnote omitted.] [Id. at 144, 106 S. Ct. at 1748, 90 L. Ed. 2d at 121.]

protect the Commonwealth. [22-23a infra.]

What is constitutionally significant is that what the Commonwealth seeks to subject petitioner to is, in practical terms, a second exposure to the ordeal of trial, a second disruption of her life.

Petitioner believes that jeopardy is a condition, not a procedure. It exists when a trial is in some sense in progress, when some phase of the determination of guilt or innocence is taking place. The provision that a defendant may not be "twice put" in this condition gives a defendant a right to reasonable continuity of the process whereby guilt or innocence is determined. Cf. Swisher v. Brady, 438 U.S. 204, 98 S. Ct. 2699, 57 L. Ed. 2d 705 (1978).

Petitioner accordingly submits that an adjournment that results in a

substantial break in the continuity of a trial is an event capable of terminating jeopardy and precludes further trial proceedings if it is ordered over the protest of the defendant and in the absence of manifest necessity, and that the mid-trial stay order entered ten years ago was a termination insulating her against "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense charged[.]" United States v. Jenkins, 420 U.S. 358, 370, 95 S. Ct. 1006, 1013, 43 L. Ed. 2d 250, 259 (1975).

Jeopardy attaches in a jury trial when the first witness is sworn, Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978), and in a nonjury trial when the first witness begins to testify, Lee v. United States, 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977).

Presumably, if the mere pendency of charges, with the uncertainty it visits upon a defendant as to his (or her) future liberty, constituted jeopardy, jeopardy would attach at the commencement of a criminal prosecution.

By instead defining jeopardy as that condition which attaches when a trial begins, Your Honorable Court has implicitly recognized that immediacy of the threat to the defendant's liberty is a necessary component of jeopardy -- that uncertainty is not enough.

An acquittal ends jeopardy absolutely by completely removing the threat and is a complete barrier to further proceedings directed at determining guilt or innocence. United States v. Martin Linen Supply Company, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).

While jeopardy may be "continuing" for some purposes after a conviction, Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984), a conviction nonetheless gives a defendant partial protection (or, more precisely, conditional protection) against retrial because it ends the uncertainty as to whether the threat will be fulfilled, subject to the prerogative of the defendant to reintroduce that uncertainty into his life by taking an appeal. United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896).

And, while jeopardy may be "continuing" for some purposes after a mistrial, Richardson v. United States, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984), a mistrial declaration has an effect converse to that of a conviction;

it removes the immediacy but not the uncertainty. It sometimes affords protection against further proceedings; its insulating effect is subject to an exception for the defendant who requests a mistrial in the absence of deliberate prosecutorial provocation, Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), and an exception for manifest necessity, United States v. Perez, 22 U.S. 579, 9 Wheat. 579, 6 L. Ed. 2d 165 (1824).

While petitioner has not, of course, been acquitted with respect to the presently pending changes, she submits that the instant stay order was the equivalent of a mistrial declaration in that it likewise removed the immediacy of the threat to her liberty: the court determined that it would proceed no further on the presently pending charges

until the appellate proceedings reached the end of the line. While the uncertainty created in her life by the filing of the charges continued, she was told that she need not return to court until a process was completed whose duration was wholly outside the control of the trial court.

That process could reasonably be expected to last at least several months and possibly several years. The threat was deferred indefinitely, the immediacy was gone, and she was free to go about her business. The commitment of the trial court's time and resources to the resolution of the matter was rescinded.

In a number of cases Your Honorable Court has recognized an interest in closure as being among those protected by the Clause: Crist, supra; Arizona v. Washington, 434 U.S. 497, 503-04, 98 S.

Ct. 824, 829-30, 54 L. Ed. 2d 707, 727 (1978); United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543, 553 (1971); Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 204 (1957). The concerns identified by the Crist decision were "the finality of judgments, the minimization of harassing exposure to the ordeal of a criminal trial, and the valued right to continue with the chosen jury[.]" Id. at 38, 98 S. Ct. at 2162, 57 L. Ed. 2d at 33.

The humanitarian concerns reflected by the Clause have a dignity of their own; it is not only those further proceedings that permit a prosecutor to start from scratch[13] that subject a defendant to

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[13]While the prosecution here rested its case in chief in 1980, it may still benefit from the delay. A prosecutor who has rested may, in the discretion of the court, be permitted to reopen his case. Commonwealth v. Irving, 485 Pa. 496, 403 A. 2d 549 (1979). He may cross-examine

"embarrassment, expense and ordeal" and inflict a "continuing state of anxiety and insecurity" upon a defendant. Green, supra, at 187-88, 78 S. Ct. at 223, 3 L. Ed. 2d at 204. It is clear from Jenkins, supra and from Smalis I that no duplication of any phase of the presentation of evidence at a criminal trial is necessary for a subsequent proceeding to constitute a second jeopardy. The only thing that needs to be duplicated for the Clause to be called into play is the intense emotional distress that a trial inflicts on a defendant.

It is also clear from Smalis I and from Jenkins that the Clause is concerned with more than a defendant's interest in

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witnesses, introduce rebuttal evidence, and sum up. The role of the prosecutor in a resumed proceeding would not be that of a potted plant.

the identity of the tribunal.[14] A second jeopardy need not involve a different tribunal to be a "harrowing experience", Crist, supra, and an occasion of "heavy personal strain", Jorn, supra at 479, 91 S. Ct. ad 554, 27 L. Ed. 2d at 553.

There are circumstances under which jeopardy will be deemed to exist even though no trial is taking place. Lydon,

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[14]Indeed, one commentator has suggested that the concern about protraction is the real interest underlying that in the identity of the tribunal:

> [A defendant] has an interest in being able "to conclude his confrontation with society" [footnote omitted] once it has begun. . . . [He] has a legitimate interest in getting the trial over with "once and for all." [Footnote omitted.] . . . [H]e also has an interest in continuing with "the first jury" [footnote omitted] in the case because changing the jury means interrupting the trial. To that extent, the defendant's interest in retaining the particular tribunal with which he began is merely an incident of his primary interest in being able to complete the trial itself. [Westen and Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review 81, 90.]

supra; Richardson, supra.[15] The limitations of the "continuing jeopardy" concept were best expressed in Justice Brennan's concurrence in Lydon:

> The question of whether jeopardy has objectively "terminated" should be analyzed in terms of the policies underlying the Double Jeopardy Clause . . . Jeopardy may be said to have terminated only when the posture of a trial in some objective sense leaves the defendant in such a position that resumption of proceedings would implicate these policies.
>
> It seems obvious that a State may not evade the strictures of the Clause simply by withholding a legal judgment and thereby subjecting a defendant to retrial on the theory of "continuing jeopardy." [Id. at 320-21, 104 S. Ct. at 1820, 80 L. Ed. 2d at 332-33.]

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[15]But see United States v. Wilson, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975) (reversal of post-verdict discharge held not to present double jeopardy problem because it would lead to reinstatement of verdict rather than retrial and there would accordingly be no new jeopardy).

The instant case is one in which the opportunity for a judgment was withheld from the defendant for no legitimate reason[16], and it would be precisely the sort of tautological approach that Justice Brennan condemned to legitimize the unnecessary placing of petitioner in a "continuing state of anxiety and insecurity" (Green, supra) by loosely labeling the state of affairs she has lived with since January 1981 "continuing jeopardy."

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[16]The manifest necessity doctrine, Perez, supra, may occasionally justify an adjournment that would otherwise end jeopardy; there may be situations in which a lengthy adjournment presents a reasonable alternative ta an ordinary mistrial. The taking of an appeal held by Your Honorable Court to have "no proper purpose" and to "frustrate the interest of the accused in having an end to the proceedings", Smalis I at 145, 106 S. Ct. at 1749, 90 L. Ed. 2d at 122, does not create manifest necessity for withdrawing from a defendant a previously promised opportunity for resolution of the charges, particularly when the defendant is willing to have the charges involved in the appeal reinstated to avoid the interruption of the trial. See Statement of the Case at 4-5 supra.

The court below, in the course of discussing a speedy trial issue that was never raised,[17] insisted that the Commonwealth had reasonably relied on prior Pennsylvania decisions. 15a infra. Whatever significance that reliance might have in contexts other than double jeopardy, it has none with respect to the issue at hand.

Any reliance on the prior state cases ceased to be reasonable no later than June of 1978[18], more than two years before the trial commenced. The Double Jeopardy Clause, moreover, is a constraint on the

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[17] See Statement of the Case at 11, supra, note 8.

[18] Scott was decided June 12, 1978; Swisher was decided June 28, 1978. Swisher clarified the effect of Scott on Jenkins and reaffirmed the "further proceedings" standard for a second jeopardy. Swisher at 218, 98 S. Ct. at 2708, 57 L. Ed. 2d at 717. Swisher thus foreclosed the possibility that appeals from insufficiency rulings made in bench trials could still be permitted.

judicial system, not on the prosecutor specifically, and no finding of the blameworthiness of a particular individual is necessary to a determination that it has been violated. See Jorn, supra at 483, 91 S. Ct. at 556, 27 L. Ed. 2d at 555. It is true, as the opinion below states (15a infra), that the prior practice was not discontinued until the Smalis I decision. But no ratification by the courts of Pennsylvania is necessary to make the law of the land the law of Pennsylvania, and petitioner should not be further penalized for Pennsylvania's failure to promptly perceive the invalidation of its prior practice.

The cases dealing with retroactivity of double jeopardy decisions have generally held those decisions to be fully retroactive. Robinson v. Neil, 409 U.S. 505, 93 S. Ct. 876, 34 L. Ed. 2d 29

(1973); Vogel v. Pennsylvania, 790 F. 2d 368 (3rd Cir. 1986); Commonwealth v. Richbourg, 442 Pa. 147, 275 A. 2d 345 (1971). In Robinson Your Honorable Court held that the decision in Waller v. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970), prohibiting state and municipal prosecutions for the same offense, was to be accorded full retroactive effect, notwithstanding that some state prosecutions might have been deferred by prosecutors who failed to anticipate that the initial municipal prosecution would be held to be the only permissible one. Your Honorable Court held the right infringed to be substantive and the claim of justifiable reliance on prior cases to be "dubious." Id. at 510, 93 S. Ct. at 879, 35 L. Ed. 2d at 34.

The instant prosecutor's reliance or prior Pennsylvania cases was more than

dubious, particularly since none of those cases had addressed the double jeopardy implications of the rule. The rule was established sub silentio in Commonwealth v. Parr, 5 Watts & Sergeant 345 (1843), some time before Benton v. Maryland, 394 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) applied the Double Jeopardy Clause to the states. The rationale of the first case to actually state the rule, Commonwealth v. Kolsky, 100 Pa. Super. 596, 598 (1930), was that an appeal from a "judgment of acquittal" entered on demurrer presented only an issue of law. Prior to petitioner's challenge to the rule, it had last been re-examined (as opposed to merely being restated) in a brief dictum in Commonwealth v. Heller, 147 Pa. Super. 68, 29 A. 2d 340 (1942). The only post-Scott pronouncement of the Supreme Court of Pennsylvania that

preceded the trial here was a dictum restating the rule in Commonwealth v. Wimberly, 488 Pa. 169, 411 A. 2d 1193 (1979).[19]

In Robinson, supra, collateral relief was granted; in Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), Your Honorable Court held that even newly declared rules, including procedural rules, should be applied to convictions still subject to direct review. Thus, even if there was something "new" about Smalis I, there is no rational basis for holding it inapplicable to Mrs.

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[19]In Wimberly the court refused to entertain an appeal from a demurrer order that reflected improper consideration of credibility, taking the position that under those circumstances the order was an acquittal. Martin Linen and Scott are supported in support of that conclusion but it is clear from the opinion that the possibility that they might preclude any appeals from demurrer orders never occurred to the court.

Smalis herself insofar as it relates to the propriety of the stay order.[20]

The court below characterized the stay as consistent with the "practice at the time in this Commonwealth[.]" 5a infra. The case that the court cites in support of this proposition -- Wimberly, supra -- contains no reference to any such practice.[21] There was exactly one reported case prior to the instant one in

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[20]Of course, the reliance issue does not arise until and unless petitioner's premise that a protracted adjournment is an event capable of terminating jeopardy is accepted.

[21]In fact, the Wimberly decision stated that the past Pennsylvania practice had been to remand for a new trial when a demurrer was found to be granted in error. Id. at 172, 411 A. 2d at 1194. In its prior decision in this case, the Supreme Court of Pennsylvania, citing Wimberly, remanded the companion case (which was also nonjury) for a new trial. The consistency of this practice with a practice of staying still outstanding charges with a view to resumption is questionable. Petitioner does not doubt, however, that the subjective intention of the instant prosecutor when the appeal was taken was to simply resume the trial before the same judge after remand.

which an prosecutor appealed a demurrer order that left some charges outstanding: Commonwealth v. Kelly, 237 Pa. Super. 468, 352 A. 2d 127 (1975). The Superior Court declined to determine whether the stay with respect to those charges was proper, stating in a footnote:

> Trial on the remaining charges filed against the appellees was suspended, pending the outcome of this appeal. . . . We need not pass upon the merits of the "suspended trial" procedure at this time. [Id. at 470, note 2, 352 A. 2d at 128, note 2.]

The decision reversed the demurrer order and remanded the case for a new trial, notwithstanding that the first trial was nonjury and that the trial judge was available. No review of this decision was sought, and whatever happened on remand did not result on a subsequent appellate decision.

Except for Kelly, no case prior to the one sub judice so much as alluded to the problem created by appeals from orders sustaining demurrers to some but not all charges.

The court below, again in the course of its discussion of the speedy trial claim it thought was before it, attached some significance to petitioner's choice not to seek the vacation of the stay order during the prior appellate proceedings. While this choice would be a factor to be considered if petitioner had raised a speedy trial claim, it is irrelevant to the double jeopardy issue. A defendant whose jeopardy terminates is under no duty to try to get back into jeopardy.

Petitioner did seek to remove the occasion for the stay; she filed an early motion to quash the appeal. Statement of the Case at 8, supra. Once the Superior

Court of Pennsylvania determined that it would not quash on a preliminary motion but would require the appeal to run its full course, the value to petitioner of a resumed trial limited to the charges left outstanding by the order then under review diminished radically. The opportunity for full and timely closure was gone. The break in the continuity of the process was a fait accompli.

The endorsement by the Supreme Court of Pennsylvania of the propriety of a resumed trial under the circumstances presented is not in accordance with applicable decisions of Your Honorable Court. The case may be an appropriate one for summary disposition. Petitioner takes the liberty of concluding with a verse in support of reversal:

> What this wretched case presents at this late hour

Is a prosecutorial crusade gone sour.

Their chance they had, their chance
they blew

Trying to retrieve their cake and
freeze it too.

Petitioner, long interned by dread,

Had wanted the trial to move ahead.

The charges now should cease to loom

So that she may her life resume.

Respectfully submitted,

Norma Chase

Norma Chase
Attorney for Petitioner

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

No. 57 W.D. Appeal Dkt. 1989

JUDGMENT

May 9, 1991

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged that the judgment of the SUPERIOR COURT OF PENNSYLVANIA be, and the same is, hereby affirmed and the case is remanded to the Court of Common Pleas of Allegheny County for further proceedings.

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

No. 57 W.D. Appeal Dkt. 1989

OPINION

MR. JUSTICE McDERMOTT

May 9, 1991

In this appeal we are asked to decide whether appellant's constitutional rights will be violated if her bench trial is resumed following an extended stay of the proceedings occasioned by the Commonwealth's appeal from an order sustaining demurrers to certain, but not all, criminal charges.

Appellant, Despina Smalis, along with her husband, owned adjoining buildings located in the Oakland section of Pittsburgh. The premises housed the "Chances R" restaurant and lounge on the first floor and seven moderately-priced rental apartments on the second floor. On the morning of February 12, 1979, at approximately 6:30 A.M., a fire occurred that resulted in the death of two tenants, Judith Ann Ross and Dale Burton. Following a grand jury investigation into the nature of the fire, criminal informations were filed by the Allegheny County District Attorney's Office charging appellant and her husband with criminal homicide[1], reckless endangerment[2],

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[1]18 Pa.C.S. §2501.

[2]18 Pa.C.S. §2705.

causing a catastrophe[3], failing to prevent a catastrophe[4], and with respect to appellant alone, securing the execution of documents by deception[5] in connection with the failure to install two fire-resistant metal doors in the building.

The parties proceeded with a bench trial in the Court of Common Pleas of Allegheny County on November 12, 1980. At the close of the Commonwealth's case-in-chief, appellant and her husband challenged the sufficiency of the evidence by way of a demurrer. The trial court sustained the demurrer to the evidence with respect to the charges of murder, voluntary manslaughter and causing a

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[3]18 Pa.C.S. §3302(a).

[4]18 Pa.C.S. §3303.

[5]18 Pa.C.S. §4114.

catastrophe. As was the practice at the time in this Commonwealth, the remaining misdemeanor charges were stayed by the trial court pending the outcome of the Commonwealth's appeal to the order sustaining the demurrer. See Commonwealth v. Wimberly, 488 Pa. 169, 411 A. 2d 1193 (1980).

The appeal to the Superior Court was taken by the Commonwealth on December 19, 1980. The Superior Court quashed the appeal on the ground that the sustaining of the demurrer was the functional equivalent of an acquittal and therefore a direct appeal by the Commonwealth was barred by the Double Jeopardy Clause of the Fifth Amendment of the United States

Constitution.[6] Commonwealth v. Smalis, 331 Pa. Super. 307, 480 A. 2d 1046 (1984). On appeal to this Court, we reversed, finding the appeal not constitutionally offensive and remanded to the Superior Court with instructions to pass upon the merits of the demurrer ruling entered by the trial court. Commonwealth v. Zoller, 507 Pa. 344, 490 A. 2d 394 (1985).[7]

At this point, appellant and her husband petitioned for a writ of certiorari to the United States Supreme Court. The Court accepted the case and

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[6]The Fifth Amendment of the United States Constitution provides, in pertinent part, that "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb; . . ." Through the Fourteenth Amendment, this provision is applicable to the States. Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

[7]Before this Court, the case was consolidated with another case pertaining to the same double jeopardy issue. Commonwealth v. Zoller, 318 Pa. Super. 402, 465 A.2d 16 (1983).

thereafter held that the grant of a demurrer at the close of the prosecution's case-in-chief constituted an acquittal under the Double Jeopardy Clause thus barring an appeal by the Commonwealth. Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). In accordance with this mandate, this Court entered a per curiam order on July 29, 1986, vacating our previous order and reinstating the order of the Superior Court which quashed the Commonwealth's appeal. Commonwealth v. Smalis, 511 Pa. 229, 512 A. 2d 634 (1986).

The Commonwealth next sought resumption of trial on the remaining misdemeanor charges originally stayed by the trial court. On December 12, 1986, appellant and her husband filed a motion to dismiss the remaining charges on various constitutional grounds. This

motion, following briefing and oral argument, was denied by the trial court on January 9, 1987. Because of the potential constitutional implication caused by the delay of the proceedings, the trial court certified the order denying the motion to dismiss the remaining charges to the Superior Court, pursuant to 42 Pa.C.S. § 702(b). The Superior Court, on appeal, affirmed the trial court's order denying the motion to dismiss, and found the constitutional claims wanting in merit. The court remanded the matter to the trial court for further proceedings. Commonwealth v. Smalis, 375 Pa. Super. 601, 545 A. 2d 284 (1988). Appellant's husband sought no further review. Appellant, however, filed an application for reargument, which was denied on August 5, 1988. We then granted appellant's petition for allowance of appeal to

examine the constitutional impact, if any, of the delay in the resumption of trial on the outstanding misdemeanor charges.

Appellant attacks the resumption of her trial on three constitutional fronts. First, she equates the delay with that of a "mistrial" and therefore asserts that the resumption of trial on the outstanding misdemeanor charges would offend the Double Jeopardy Clause. Appellant argues that the substantial break in the continuity of the trial, in effect, removed jeopardy since the immediacy of the threat to her liberty was terminated with the stay. We disagree with this assertion.

The Double Jeopardy Clause has been recognized by the United States Supreme Court as having three separate and distinct objectives: the protection of the integrity of a final judgment, the

prohibition against multiple prosecutions, even where no final determination of guilt has been made, and the proscription against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). See also Commonwealth v. Zoller, 507 Pa. at 349-52, 490 A. 2d at 396-98; Commonwealth v. Frisbie, 506 Pa. 461, 485 A. 2d 1098 (1984). Under the facts of this case, we are confronted with neither a final judgment, multiple prosecutions nor multiple punishments. Rather, with respect to the remaining misdemeanor charges, jeopardy does not come into play because the trial court denied appellant's demurrer to these charges and found as a matter of law that the Commonwealth's evidence was sufficient to establish appellant's guilt beyond a reasonable doubt. See Commonwealth v. Mitchell, 460

Pa. 665, 334 A. 2d 285 (1975); Commonwealth v. DePetro, 350 Pa. 567, 39 A. 2d 838 (1944). Therefore, since these remaining charges survived the demurrer challenge and as of this date appellant has not been "acquitted" of these charges, we see no double jeopardy implication that would preclude further prosecution.

Appellant's second argument pertains to an alleged violation of her rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. The Sixth Amendment provides that an accused, "in all criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him, [and] to have compulsory process for sustaining witnesses in his

favor."[8] The extent to which a criminal defendant can cross-examine the witnesses testifying against him is controlled by the confrontation clause. The purpose of the clause is to provide an accused with an effective means of challenging the evidence against him by testing the recollection and probing the conscience of an adverse witness. Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). Nothing in this record indicates that appellant's rights under this specific clause have been violated. In the instant case, these proceedings were stayed after the Commonwealth presented all of its evidence. Appellant, prior to the stay order, did have full opportunity to confront and cross-examine

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[8]United States Constitution, Amend. VI. The Pennsylvania Constitution guarantees an accused the right to "meet the witnesses face to face." Pennsylvania Constitution, Art. 1, §9.

all of the Commonwealth's witnesses during the case-in-chief. Thus, this constitutional protection has not been violated by the delay in trial.

Finally, appellant maintains that the extended delay in the resumption of trial has deprived her of due process protection found in the Fifth and Fourteenth Amendments that guarantee her the right to a fair trial. This argument, although general in nature, requires us to utilize the speedy trial analysis as articulated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In determining whether the right has been violated, a court should weigh four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker, id. at 530, 92 S. Ct

at 2192, 33 L. Ed. 2d at 117. Because "the right to a speedy trial is a more vague concept than other procedural rights", courts must "approach speedy trial cases on an ad hoc basis." Barker, id. at 521, 530, 92 S. Ct. at 2187, 2192, 33 L. Ed. 2d at 112, 116-17.

In applying this four-part balancing test to determine whether the delays infringed upon appellant's right to a speedy trial, we proceed to analyze each of these factors as they pertain to the facts of appellant's case. First, all would concede that the length of the initial delay prompted by the Commonwealth's appeal of the demurrer order -- approximately six years, from the date of the trial court's stay order to the filing of appellant's motion to dismiss -- was lengthy and presumptively prejudicial, thus triggering this

analysis. However, closely related to its length is the reason that would justify the delay, the second factor. Here, the Commonwealth's appeal from the sustaining of appellant's demurrers was allowable under the well-established law of this Commonwealth applicable at that time. See, e.g., Commonwealth v. Wimberly, 488 Pa. at 172, 411 A. 2d at 1194, citing Commonwealth v. Long, 467 Pa. 98, 354 A. 2d 569 (1976); Commonwealth v. Simpson, 310 Pa. 380, 165 A. 498 (1933). It was not until the United States Supreme Court rendered its decision in this case that this practice was discontinued. Thus, the explanation for the delay was reasonable under existing law and the Commonwealth's decision to file a direct appeal can not be characterized as evincing a bad faith or dilatory purpose. See United States v.

Loud Hawk, 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986).

The third factor to be considered is appellant's responsibility to assert her right to a speedy trial. While appellant did oppose the granting of the stay in open court at the hearing held on the matter, she did not subsequently challenge this stay order until the filing of her motion to dismiss the remaining charges. Stay orders are reviewable by the appropriate appellate courts. See generally Pa.R.A.P. 1501 et seq. and 1701 et seq. Appellant's decision not to challenge the stay by way of appellate review weighs against her position that she fully asserted her right to a speedy trial.

Last, the issue of prejudice to appellant must be viewed in terms of appellant's ability to receive a fair

trial. As stated by the United States Supreme Court in Barker v. Wingo:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

407 U.S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118 (citations omitted).

With respect to this factor of the balancing test, appellant offers nothing more than a general assertion of prejudice

and fails to set forth any specific argument on this point. Rather, she merely points to the possibility of impairment of her ability to a fair trial given the voluminous testimony that the trial court would be required to judge. This "possibility of prejudice" is not sufficient to support appellant's position that her due process rights would be violated should her trial resume. It is significant to note that following oral argument on appellant's motion to dismiss the outstanding charges, and upon review of the record, the trial court ordered that the trial should continue. Implicit in this determination is its ability to further hear the case. The trial court, and not this Court, sits at the appropriate vantage point to make this decision and absent an abuse of discretion, it should not be disturbed.

Therefore, without more than only a possibility of prejudice, this Court is unable to afford appellant the requested relief.

On the record before us we cannot hold that the delay in resuming appellant's trial on the remaining misdemeanor charges will deny her the right to a fair trial.

Accordingly, the order of the Superior Court is affirmed and the case is remanded to the Court of Common Pleas of Allegheny County for further proceedings.

It is so ordered.

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

No. 57 W.D. Appeal Dkt. 1989

DISSENTING OPINION

MR. JUSTICE ZAPPALA

May 9, 1991

The majority contends that the lengthy stay of the proceedings does not violate the principle of double jeopardy because there was neither a final judgment nor multiple prosecutions or punishments. For purposes of applying the double jeopardy concept, I perceive no distinction between multiple prosecutions

and the piecemeal prosecutions afforded by the hiatus between the trial and the "continuation" of the trial in this case. The "continuance" in this case effectively terminated the trial - what the Appellant now seeks is to prevent a second trial on the misdemeanor charges.

Article 1, §10 of the Pennsylvania Constitution states, in relevant part, that "No person shall, for the same offense, be twice put in jeopardy of life or limb . . . ." The protection afforded under the double jeopardy clause seeks to ensure that an accused will not be subject to the harassment of successive trials. It is facetious to suggest that a trial on the misdemeanor charges would not be a successive trial. No final judgment on those charges was entered in 1980, but prosecution of those charges was certainly undertaken. Jeopardy attached in this

case when the trial judge began to hear evidence.

There are varying circumstances that will call into play the double jeopardy clause, but this case presents only the very simplest of those. It is unnecessary to string cite cases, or engage in intellectual debate, to see that this factual scenario was exactly what Article 1, §10 was intended to guard against.

The trial of the Appellant was terminated without a verdict on the misdemeanor charges when the Commonwealth appealed from the trial court's order sustaining the demurrer to several of the charges. This was not a mere "continuance"; nor is the second trial a "resumption" of the first. Whatever the practice in the Commonwealth may have been in November, 1980, the double jeopardy clause may not be reshaped to accommodate

the Commonwealth's reliance on that practice. The double jeopardy clause protects the accused. It may not be reinterpreted to protect the Commonwealth.

I need look no further than our own Constitution for the protections afforded to the Appellant and do not address the double jeopardy clause of the federal Constitution for that reason. I dissent.

Mr. Justice Larsen joins in this Dissenting Opinion.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

Nos. 71 and 1546 Pittsburgh 1987

ORDER

August 5, 1988

The court hereby DENIES appellant's petition for reargument of the decision dated June 2, 1988.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

Nos. 71 and 1546 Pittsburgh 1987

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

ERNEST SMALIS,
Appellant

Nos. 72 and 1547 Pittsburgh 1987

ORDER

June 2, 1988

Orders affirmed. Case remanded for further proceedings. We relinquish jurisdiction.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

Nos. 71 and 1546 Pittsburgh 1987

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

ERNEST SMALIS,
Appellant

Nos. 72 and 1547 Pittsburgh 1987

BEFORE: ROWLEY, DEL SOLE,
and MONTGOMERY, JJ.

OPINION PER CURIAM

June 2, 1988

These appeals arise from the trial court's denial of appellants' motion to dismiss the charges against them on

grounds of double jeopardy following argument. Finding appellants' claims to be meritless we affirm the orders of the trial court, and remand for further proceedings.

Appellants were charged with criminal homicide, recklessly endangering another person, causing a catastrophe and failing to prevent a catastrophe as the result of a fire which destroyed a building they owned on February 12, 1979. Appellant Despina Smalis was also charged with theft by deception. At the conclusion of the prosecution's case, the trial court sustained demurrers on the charges of murder, voluntary manslaughter and causing a catastrophe. Trial on the remaining charges of involuntary manslaughter, recklessly endangering another person, failing to prevent a catastrophe and theft by deception (this charge as to appellant

Despina Smalis only) was continued to permit the Commonwealth to appeal the order sustaining the demurrers.

The Commonwealth appealed to this court which found that such an appeal was barred by double jeopardy. Commonwealth v. Smalis, 331 Pa. Super. 307, 480 A. 2d 1046 (1984). The Commonwealth then appealed our disposition to the Pennsylvania Supreme Court, which reversed this court's order and remanded for our review on the merits of the trial court's order sustaining the demurrers. Commonwealth v. Zoller, 507 Pa. 344, 490 A. 2d 394 (1985). Appellants' petitions for writ of certiorari to the United States Supreme Court were granted, and that court found that the Commonwealth's appeal was barred by double jeopardy, reversing the Pennsylvania Supreme Court. Smalis v. Pennsylvania, 476 U.S. 140, 106

S. Ct. 1745, 90 L. Ed. 2d 116 (1986). In accordance with the mandate of the United States Supreme Court, the Pennsylvania Supreme Court reinstated the order of this court quashing the Commonwealth's appeal. Commonwealth v. Smalis, 511 Pa. 229, 512 A. 2d 634 (1986). Attempts to proceed to trial prompted appellants to file the aforementioned motion to dismiss the charges against them.

Nos. 71 and 1546 Pittsburgh 1987

Appeal of Despina Smalis

Appellant Despina Smalis raises the following two (2) claims for our review, which will be addressed seriatim:

I. Whether retrial or resumption of a nonjury trial after a protracted "recess", during which the Commonwealth pursued an appeal from an order ultimately and not altogether unpredictably held to be an unappealable acquittal, subjects appellant to double jeopardy

with respect to the charges that were not involved in the previously appealed order?

II. Whether the resumption of a nonjury trial some seven years after it was "recessed" for an impermissible appeal deprives appellant of due process and confrontation rights?

Appellant's first claim is clearly meritless. We initially note agreement with appellant's concession that the instant charges were not the subject of the previously sustained demurrers. The Supreme Court of the United States has held that, when a court finds the Commonwealth's evidence to be so lacking in sufficiency that no rational finder of fact could base a conviction on that evidence, the principles of double jeopardy bar a second trial. United States v. Scott, 437 U.S. 82, 97, 98 S. Ct. 2187, 2197, 57 L. Ed. 2d 65, 78 (1978) (cites omitted). Compare, Tibbs v.

Florida, 457 U.S. 31, 40-41, 102 S. Ct. 2211, 2217, 72 L. Ed. 2d 652, 660-61 (1982) (cites omitted). No such finding was made regarding the subject charges of the instant appeal; therefore, they do not give rise to the double jeopardy preclusion to further prosecution.

Secondly, we note that the Commonwealth's appeal from the sustaining of appellant's demurrers was proper in light of the well-established state of the law of this Commonwealth at the time. See, e.g., Commonwealth v. Wimberly, 488 Pa. 169, 172, 411 A. 2d 1193, 1194 (1985), citing Commonwealth v. Long, 467 Pa. 98, 354 A. 2d 569 (1976) and Commonwealth v. Simpson, 310 Pa. 380, 165 A. 498 (1933). As a result, the Commonwealth's appeal was not a frivolous delaying tactic, as is suggested by appellant, but an often utilized, properly relied upon process.

We, therefore, will not penalize the prosecution for failing to predict a change in the law of the Commonwealth. Specifically, they will not be penalized for failing to foresee that their right to appeal the grant of demurrers would be nullified by the United States Supreme Court.

As to appellant Despina Smalis' second claim of error, our determination of whether she has been denied her rights to due process and confrontation due to the delay in proceeding to trial on the remaining charges must be guided by the four factors set forth by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972). Cf., Burkett v. Cunningham, 826 F.2d 1208, 1219-1222 (3rd Cir., 1987). These four factors are (1) the length of the delay;

(2) the reason for the delay; (3) appellant's assertion of her right; and, (4) prejudice to appellant. In applying these factors, we note that each is a guide to balancing appellant's interest and those of the Commonwealth in order to assess whether basic due process requirement of fairness have been satisfied. United States v. $ 8,850.00, 461 U.S. 555, 564-565, 103 S. Ct. 2005, 2013, 76 L. Ed. 2d 143, 152 (1986). Furthermore, no single factor alone is sufficient to indicate a deprivation of the right to a speedy trial. Barker v. Wingo, supra at 533, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118. It is clear that the delay herein of over six (6) years was lengthy. However, since we must make a determination based upon all four of the Barker factors, the lengthy delay standing

alone is insufficient to deprive appellant of the right to a speedy trial.

In light of the state of the law at the time the Commonwealth appealed from the grant of appellant's demurrers and successfully sought a stay of the proceedings on the remaining charges, we find the reason for the delay to be reasonable. That finding is buttressed by the fact that the record discloses no evidence of bad faith or dilatoriness on the part of the Commonwealth as is set forth hereinabove in response to appellant's first claim of error. Cf., United States v. Loud Hawk, 474 U.S. 302, 315, 106 S. Ct. 648, 656, 88 L. Ed. 2d 640, 654 (1986).

Appellant clearly asserted her right by opposing the request for a stay. However, she failed to subsequently challenge the order to stay the proceeding

through appellate processes.[1] Her rationales for the failure are that (1) she was under no duty to appeal the stay order, likening the situation to one where a failure to consent to a mistrial cannot be inferred from the failure to object; and (2) she had no assurance that the vacating of the stay order would not have resulted in a "piecemeal disposition" of the charges. This amounts to a strategic decision on the part of appellant and her counsel, which does not negate the fact that she had the right to appeal the stay order and chose not to do so. We therefore find that appellant did not fully assert her right as required by the third factor of the Barker test.

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[1]Stay orders are reviewable by the appropriate appellate courts. See generally, Pa.R.A.P. 1501 et seq., and Pa.R.A.P. 1701 et seq.

Finally, we look to the prejudice that may have attached to appellant's case as a result of the delay. Appellant sets forth no specific arguments of prejudice for our consideration, and our review of the record does not disclose prejudice sufficient to weigh in appellant's favor. Cf. United States v. Loud Hawk, supra at 315, 106 S. Ct. at 656, 88 L. Ed. 2d at 654 (1986).

We find that appellant does not satisfy the balancing test set forth in Barker. Accordingly, her claim that she will be deprived of her due process rights if trial is resumed is meritless.

Nos. 72 and 1547 Pittsburgh 1987

Appeal of Ernest Smalis

Appellant Ernest Smalis raises the following five (5) claims for our review, which will be addressed seriatim:

I. Whether the speedy trial and due process provisions of the Pennsylvania and United States Constitutions prohibit further proceedings on the counts as to which demurrers were not sustained, such that the trial court erred in denying appellant's motion to dismiss the informations?

II. Whether the double jeopardy provisions of the United States and Pennsylvania Constitutions prohibit further trial proceedings on the counts as to which demurrers were not sustained when, contrary to the double jeopardy clause, the Commonwealth tried to appeal from the counts as to which demurrers were sustained, and again contrary to the double jeopardy clause and contrary to the law concerning the availability of a "stay", the trial court granted the Commonwealth's motion for a stay pending the outcome of its efforts to appeal?

III. Whether the components of the due process clauses which guarantee appellant a full and fair hearing, i.e., a hearing conducted in a meaningful manner, prohibit further trial proceedings on the counts as to which demurrers were not sustained, such that the trial court erred in denying

appellant's motion to dismiss the informations?

IV. Whether proceedings on the counts as to which demurrers were not sustained are barred by 18 Pa.C.S. §109(4), since the trial court's erroneous order that trial proceedings on the counts as to which demurrers had not been sustained be stayed pending the Commonwealth's unconstitutional and unsuccessful attempt to appeal the order sustaining demurrers "improperly terminated" the prosecution?

V. Whether, because the trial court erred in granting the Commonwealth's motion to stay the proceedings, further proceedings are now barred?

It is clear that appellant Ernest Smalis' first two assignments of error are identical to those proposed by his wife, appellant Despina Smalis. As a result, we need not commit ourselves to further discourse on these claims of error.

Appellant's third claim is merely a reiteration of his due process allegation in the context of the right to a full and

fair hearing "at a meaningful time and in a meaningful manner." In support of his argument, appellant relies upon the argument set forth in his due process claim. His attempt to reargue due process considerations fails for the same reasons set forth in response to that claim.

As to his fourth assignment of error, appellant argues that 18 Pa.C.S. §109(4) bars further proceedings because the stay of the trial as to the remaining charges pending resolution of the Commonwealth's appeal from the sustained demurrer is tantamount to a termination of the proceedings. 18 Pa.C.S. §109(4) provides:

> When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:
>
> > (4) the former prosecution was improperly terminated after the first witness was

> sworn but before a verdict, or after a plea of guilty was accepted by the court.

Appellant's claim that the stay order effectively terminated the prosecution is meritless in light of the particular circumstances of the instant case. As we noted in our analysis of appellant Despina Smalis' double jeopardy claim, the Commonwealth had, at the time, a right to appeal from the sustaining of a demurrer, thereby negating any purported impropriety. Furthermore, the stay order permitted the court to hold trial on the remaining charges in abeyance pending resolution of that appeal. As no judgment of acquittal nor one of conviction was entered on the remaining charges they cannot be viewed as having been terminated. Appellant, of course, offers no legal support for his argument that the stay was effective termination, since his

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claim is not substantiated by discernible legal principles.

As to appellant's final claim, we find no error on the part of the trial court in granting the commonwealth's motion to stay the proceedings. The Pennsylvania Supreme Court held in Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 552-54, 467 A. 2d 805, 808-809 (1983) that the standards established by Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir., 1958) as refined by Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir., 1977) provide "a rational basis for the issuance of a stay pending appeal and are the criteria to be followed by the courts of this Commonwealth." Id. at 554, 467 A. 2d at 809. These criteria are:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.

2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.

3. The issuance of a stay will not substantially harm other interested parties in the proceedings.

4. The issuance of a stay will not adversely affect the public interest.

Pennsylvania Public Utility Commission v. Process Gas Consumers, supra at 552-53, 467 A. 2d at 809.

The Process Gas Consumers court explained the use of the above criteria by stating that "when confronted with a case in which the other three factors strongly favor interim relief, [a court] may exercise its discretion to grant a stay if the movant has made a [demonstration of probability of success] on the merits."

Id., quoting, Washington Metropolitan Area Transit Commission v. Holiday Tours, supra. In applying those standards to the instant case, the issuance of a stay was justified. Therefore, further proceedings are not barred.

Orders affirmed. Cases remanded for further proceedings. We relinquish jurisdiction.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

DESPINA SMALIS

CC 8000930
CC 8001208
CC 8001209

MEMORANDUM AND FINDINGS RE DENIAL OF DEFENDANT'S MOTION TO DISMISS

Henry R. Smith, Jr., Judge

February 12, 1987

Despina Smalis, the above named defendant was a co-defendant with her husband, Ernest Smalis and proceeded in a joint trial before the Court without a jury. The history of the proceedings in her case has been similar to that of Ernest Smalis.

After the remand of the informations to the trial Court for disposition, the Court scheduled for trial those counts remaining after the demurrers had been granted which were the following:

"Chances R" - Despina Smalis

CC 8000930 - Involuntary Manslaughter (2 counts)
CC 8001209 - REAP (2 counts)
CC 8001209 - Failure to Prevent a Catastrophe
CC 8001208 - Securing Execution of Documents by Deception

Prior to trial, the attorney for the defendant filed a Motion to Dismiss on the grounds of double jeopardy, which after arguments was denied. The defendant thus appealed from that ruling.

In response to the Commonwealth's request for a "Written Finding Sur Defendant's Claim of Double Jeopardy", the Court finds that the motion is not frivolous and that the appeal from the denial of the motion should therefore be

allowed. The reasons for the finding are stated in more detail in the "Memorandum and Finding" with respect to Ernest Smalis which is being filed on this date.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

ERNEST SMALIS

CC 8000931
CC 8001212

MEMORANDUM AND FINDINGS RE DENIAL OF DEFENDANT'S MOTION TO DISMISS

Henry R. Smith, Jr., Judge

February 12, 1987

Ernest Smalis, the above named defendant, was charged in the above stated informations with a number of offenses. The informations were tried before the Court without a jury, commencing on November 12, 1980. After the Commonwealth concluded its presentation of evidence,

the Court, on motion of the defense, sustained demurrers to several of the crimes charged. The Commonwealth appealed from the Court's order granting the demurrers. On January 9, 1981, the Commonwealth moved to stay further proceedings pending disposition of the appeal and the Court granted the motion. Since that time, the case has had a long history of appeals through the Superior Court and the Supreme Court of Pennsylvania. Thereafter, on motion of the defense, certiorari was granted [by] the U.S. Supreme Court which reversed the decision of the Pennsylvania Supreme Court. The record was subsequently remanded to the trial Court for disposition of the several charges remaining against the defendant.

After the remand of the record, when the informations were being scheduled for

trial, the defense filed a Motion to Dismiss the charges on the grounds of double jeopardy. Arguments were held on the Motion to Dismiss. After review of the record, the Motion was denied and the remaining charges in the informations were scheduled for trial. Thereafter, prior to trial, the defense appealed from the Order of Court of January 7, 1987, denying the Motion to Dismiss. The Commonwealth then filed a "Request for Written Finding Sur Defendant's Claim of Double Jeopardy." This memorandum is filed in response to that request.

The defendant was initially charged in the above stated informations as follows:

CC 8000931:

1st. Criminal Homicide
2nd. Criminal Homicide

CC 8001211:

1st. Recklessly endangering another person
2nd. Recklessly endangering another person
3rd. Causing Catastrophe
4th. Causing Catastrophe
5th. Failure to Prevent Catastrophe

After the Commonwealth had presented its evidence, the Court on motion of the defense, sustained demurrers to the charges of murder and voluntary manslaughter in the information at CC 8000931; and to the 3rd and 4th counts of the information at CC 8001211 - Causing a Catastrophe. The Commonwealth then indicated its intent to appeal that ruling and filed a Motion to Stay. The Court granted the Commonwealth's motion on January 9, 1981 and a copy of the court order is attached hereto[.] [59-62a infra.] In that order, the Court indicated that the stay order was being granted to "preserve the right of the

Commonwealth to prosecute said charges" and stayed the proceedings "until a time not later that 120 days following the date of the remand of the record following the resolution of the final appeal." Although the defense had objected to the grant of the stay order, the trial Court is not aware of any challenge to that order in any of the subsequent proceedings.

The Superior Court in its opinion of June 29, 1984, (331 Pa. Super. 307, 480 A. 2d 1046), determined that the appeal by the Commonwealth was improper and ordered that the appeal be quashed. In its opinion, the Court stated the following -

> Prior Pennsylvania decisions holding that orders sustaining demurrers are appealable can no longer be followed. They are at variance with decisions of the Supreme Court of the United States. We hold, therefore, that a mid-trial order holding the evidence insufficient to support a conviction is not appealable by the Commonwealth.

The Supreme Court on March 29, 1985, reversed the Order of the Superior Court and remanded the record [to] the Superior Court to pass upon the demurrer ruling, stating the following with respect to the Commonwealth's appeal -

> Specifically, the issue raised is whether our procedure which permits a trial court's order sustaining a demurrer to the Commonwealth's evidence to be reversed upon appeal, allows a new trial when the order was erroneously entered. For the reasons that follow we are satisfied that our procedure does not offend double jeopardy.

It is clear that, under the law at the time of the Commonwealth's appeal, that the Commonwealth had the right to appeal, and that it was the obligation of [the] trial court to stay further proceedings pending the ruling on the Commonwealth's motion to stay the proceedings.

Thus, it appears that there was a difference of opinion in the appellate courts with respect to the right of appeal from the trial court's order and the issue was of such significance that the U.S. Supreme Court granted certiorari.

In view of the overall background and circumstances of this case, and the law at the time of the Commonwealth's appeal, the trial court finds that the delay of the proceedings as to the remaining counts in the informations on which there has been no adjudication is an important issue with regard to the defendant's claim of double jeopardy. Therefore, the appeal now taken by the defense from the denial of the Motion to Dismiss is not frivolous; and the appeal should be allowed in order that the issues may be determined by the appellate court.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

DESPINA SMALIS

CC 8000930
CC 8001208
CC 8001209

ORDER OF COURT

Henry R. Smith, Jr., Judge

January 9, 1987

Despina Smalis, the above named defendant filed through her attorney a "Motion to Dismiss Informations" on the basis of double jeopardy, due process, and other reasons. The above motion was argued before the Court and, after

consideration thereof, it is ordered that said motion be and is hereby denied.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

DESPINA SMALIS

CC 8000930
CC 8001208
CC 8001209

COMMONWEALTH MOTION TO STAY

January 9, 1987

AND NOW COMES the Commonwealth of Pennsylvania through its attorney, ROBERT E. COLVILLE, District Attorney of Allegheny County, and M. SUSAN RUFFNER, Assistant District Attorney, and F. PETER DIXON, Assistant District Attorney, and respectfully represents the following:

1. The co-defendants in the instant case are Ernest Smalis, a/k/a Anastasios Smalis (charged at CC 8000931 with two counts of Criminal Homicide, 18 Pa.C.S. §2501 and at CC 8001211 with two counts of Recklessly Endangering Another Person, 18 Pa.C.S. §2705, two counts of Causing a Catastrophe, 18 Pa.C.S. §3302(a) and one count of Failure to Prevent a Catastrophe, 18 Pa.C.S. §3303), and Despina Smalis, a/k/a Pepe Smalis, (charged with the identical offenses at CC 8000930 and CC 8001209, respectively).

2. On or about December 19, 1980, This Honorable Court granted defendant's Motion for Demurrer on all charges of Criminal Homicide with the exception of Involuntary Manslaughter and granted the motion as to both counts of Causing a Catastrophe.

3. On December 19, 1980, the Commonwealth filed a Notice of Appeal on the appropriate parties, informing them of the Commonwealth's appeal to the Superior Court of Pennsylvania from the Order entered by This Honorable Court.

4. Subsequently, the defendant petitioned for reconsideration of the lower court's Order, which petition was granted.

5. Reargument on the Motions for Demurrer [was] heard on January 5, 1981.

6. On January 8, 1981, This Honorable Court sustained the Motion for Demurrer as to the following counts: CC 8000931, Murder in the First Degree, Murder in the Second Degree, Murder in the Third Degree, and Voluntary Manslaughter; CC 8001211, two counts of Causing a Catastrophe; CC 8000930, Murder in the

First Degree, Murder in the Second Degree, Murder in the Third Degree, and Voluntary Manslaughter; CC 8001209, two counts of Causing a Catastrophe.

7. The Commonwealth has concluded it will not discontinue its appeal to the Superior Court of Pennsylvania.

8. The Commonwealth avers that the collateral estoppel principles enunciated in Commonwealth v. Campana, 452 Pa. 233, 304 A. 2d 432 (1973) and in the Pennsylvania Crimes Code §109, §110 prevent further consideration of those changes not stayed by the Commonwealth appeal. The Commonwealth, upon successful appeal to the appellate court, would be precluded from proceeding on remanded charges.

WHEREFORE, the Commonwealth respectfully requests a Stay on all

charges upon which the defendants' Motion for Demurrer was denied.

Respectfully submitted,

ROBERT E. COLVILLE,
District Attorney

s/M. Susan Ruffner,
Assistant District Attorney

s/F. Peter Dixon
Assistant District Attorney

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

ERNEST SMALIS

CC 8000931
CC 8001212

COMMONWEALTH OF PENNSYLVANIA

vs.

DESPINA SMALIS

CC 8000930
CC 8001208
CC 8001209

ORDER OF COURT

Henry R. Smith, Jr., Judge

AND NOW, to-wit, this 9th day of January, 1981, after hearing and argument in open court, it is the finding of this

Court that the trial of the defendants upon the within charges commenced before this Court without a jury on November 12, 1980; that on December 19, 1980, and January 8, 1981, the Commonwealth appealed to the Superior Court of Pennsylvania the rulings of this Court sustaining demurrers to counts of Murder of the First, Second, and Third Degree, Voluntary Manslaughter, and Causing a Catastrophe (two counts) filed against both defendants in the case styled "Chances R"; that a stay of all further proceedings regarding the remaining "Chances R" charges listed below, to which demurrers were denied, is necessary to preserve the right of the Commonwealth to prosecute said charges;

NOW, THEREFORE, the Motion of the Commonwealth to Stay is hereby granted in part and denied in part: namely, it is Ordered that all further proceedings be,

and the same hereby are, stayed as to the following charges against the defendants until a time not later than 120 days following the date of the remand of the record following the resolution of the final appeal from the orders of this Court of December 19, 1980, and January 8, 1981:

"Chances R" - Ernest Smalis

CC 8000931 - Involuntary Manslaughter (2 counts)
CC 8001211 - REAP (2 counts)
CC 8001211 - Failure to Prevent a Catastrophe

"Chances R" - Despina Smalis

CC 8000930 - Involuntary Manslaughter (2 counts)
CC 8001209 - REAP (2 counts)
CC 8001209 - Failure to Prevent a Catastrophe
CC 8001208 - Securing Execution of Documents by Deception

Motion to Stay is denied as to the following charges:

"Moonraker" - Ernest Smalis only

CC 8001212 - Arson (2 counts)
Theft by Deception (2 counts)

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

DESPINA SMALIS

CC 8000930
CC 8001208
CC 8001209

MOTION TO DISMISS CHARGES

December 12, 1986

1. On November 12, 1980 nonjury trial of defendant on charges of criminal homicide, recklessly endangering another person, causing catastrophe, failure to prevent catastrophe, and securing execution of documents by deception commenced.

2. At the close of the Commonwealth's case, defendant demurred to the evidence.

3. On December 19, 1980 the trial court sustained the demurrer with respect to murder, voluntary manslaughter, and causing catastrophe, and denied the demurrer with respect to the remaining charges.

4. The Commonwealth appealed to the Superior Court of Pennsylvania from the orders sustaining the demurrers, and also sought reconsideration of the orders.

5. In order to avoid the possible interruption of the trial, defendant attempted unsuccessfully to withdraw her demurrer and then joined in the request for reconsideration.

6. The court granted reconsideration but reaffirmed its original orders on January 8, 1981.

7. The Commonwealth then appealed to the Superior Court from the reaffirmance of the orders and filed a motion requesting that further proceedings on the remaining charges be stayed pending disposition of the appeals.

8. Over defense objection, the motion to stay was granted on January 9, 1981.

9. The appellate process culminated in a unanimous decision of the United States Supreme Court, entered May 5, 1986, holding that the Commonwealth's appeal from the order sustaining the demurrer was barred by the Double Jeopardy Clause and stating that such an appeal "has no proper purpose" and "would frustrate the interest of the accused in having an end to the proceedings against him."

10. The Commonwealth proposes to "resume" trial on the remaining charges.

11. The "resumption" of the trial would violate defendant's double jeopardy rights, her rights under §109 and §110 of the Crimes Code, her due process rights, and her confrontation rights.

12. Defendant accordingly requests that the charges be dismissed.

s/Norma Chase
Attorney for Defendant

Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

(2)

IN THE

SUPREME COURT OF THE UNITED STATES

No. 91-60

DESPINA SMALIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL STATEMENT OF THE CASE

After the instant certiorari petition was filed, the opinion of the Supreme Court of Pennsylvania was published at 590 A. 2d 1250, appearing in an advance sheet dated July 12, 1991. On July 23, 1991, a dissenting opinion authored by Mr. Justice Papadakos and joined by Mr. Justice Larsen (who had also joined Mr. Justice Zappala's previously filed dissent) was filed.

Mr. Justice Papadakos took the position that resumption of trial would offend the federal Double Jeopardy Clause, the Due Process Clause, and the Confrontation Clause.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

Mr. Justice Papadakos states:

> Simply because the instant facts do not fit neatly into previously existing categories

> is no reason not to find a constitutional violation where fundamental constitutional policies are impinged [upon]. The delay here was too long to allow us in any but a mechanical and overly technical way to conclude that initial jeopardy continued. . . . It would be patently unfair to subject Appellant to further trial at this point. [17b infra.]

To the foregoing petitioner can only add: Amen!

Respectfully submitted,

Norma Chase

Norma Chase
Attorney for Petitioner

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

No. 57 W.D. Appeal Dkt. 1989

DISSENTING OPINION

MR. JUSTICE PAPADAKOS

July 23, 1991

I am convinced that the adjournment of the non-jury trial that occurred in this case, which, in turn, resulted in a ten-year break in the continuity of that trial (a substantial period of time by any standard), caused by repeated appeals instigated by the Commonwealth, is the functional equivalent of a mistrial in

that it removed the immediacy of the threat to the defendant's liberty. It is, accordingly, an event that terminated jeopardy. Once jeopardy has ended, further proceedings directed at determining guilt or innocence, even the completion of an interrupted trial, are prohibited.

Jeopardy may be deemed to "continue" after the abortion of a trial only when that action was based on manifest necessity. The instant stay order was not; the Appellant-defendant (and her co-defendant) were willing to suffer the reinstatement of the murder charges to avoid the interruption of the trial. The prosecutor rejected this alternative.

Jeopardy exists when a trial is in some sense in progress, when some phase of the determination of guilt or innocence is taking place. I am persuaded that the

constitutional provision that a defendant may not be "twice put" in this condition gives a defendant a right to reasonable continuity of the process by which guilt or innocence is determined. An indefinite adjournment that results in a ten year break in the continuity of the trial is an event terminating jeopardy and precludes retrial if it is ordered over the protest of the defendant (as here), in the absence of manifest necessity (as here), and is caused by multiple appeals, instigated by the Commonwealth (as here).

The indefinite nature of the adjournment in this case and its resultant ten year delay distinguish this case from the handful of cases in other jurisdictions that have considered and rejected double jeopardy claims arising out of mid-trial continuances. The longest break involved in any such case

appears to have been a 42-day adjournment (to a date certain) in a North Carolina juvenile proceeding. Matter of Hunt, 46 N.C. App. 732, 266 S.E.2d 385 (1980). A number of other cases have found shorter recesses to be inoffensive to the Double Jeopardy Clause. Webb v. Hutto, 720 F.2d 375, 379 (4th Cir. 1983) (five days); State v. Sipe, 537 So.2d 178 (Fla. App. 1989) (four weeks); State v. Poullard, 532 So.2d 327, 330 (La. App. 1988) (two days); State v. Johnson, 529 So.2d 466 (La. App. 1988) (two weeks); King v. State, 527 So.2d 641, 644 (Miss. 1988) (six days); State v. Carter, 289 N.C. 35, 220 S.E.2d 313, 318 (1975) (seven days); Wortham v. State, 750 S.W.2d 326, 328 (Tex. App. 1988) (seven days). See also, State v. Jackson, 485 So.2d 630 (La. App. 1986) (recess of unspecified length held not to implicate Double Jeopardy Clause).

What these cases establish is that a defendant cannot demand perfect continuity of the trial process. They do not negate the existence of a right to reasonable continuity.

Two decisions have found double jeopardy to be violated following a recess in a non-jury trial. In State v. O'Keefe, 135 N.J. Super 430, 343 A. 2d 509 (1975), the prosecutor was granted a two-week recess so that he could obtain evidence without which his case was insufficient. The court found his neglect inexcusable and held that under such circumstances the continuance was an unreasonable break in the continuity of the trial, stating at 343 A. 2d 514:

> A continuance differs from a mistrial-retrial in that it does not deprive the defendant of a verdict rendered by the original tribunal. Thus, a continuance protects the defendant's interest in securing an

> acquittal from a tribunal which has heard a weak State's case -- one basis for the prohibition against double jeopardy. [Citations omitted.] Yet, double jeopardy has been invoked to prohibit a second prosecution even though the first jury heard no evidence before a mistrial was declared. [Citations omitted.]
>
> Accordingly, a continuance might also violate the double jeopardy prohibition, for the essential element of double jeopardy is the oppressive harassment of a presumably innocent person attendant upon a repeated prosecution. There is not only the anxiety of a second trial, but the often greater anxiety in awaiting a second trial. This affects a defendant personally as well as in his relations with others.

Accord: Belveal v. Rambo, 487 P.2d 714 (Okl. Cr. App. 1971).

The O'Keefe decision recognized that there are policy concerns underlying the Double Jeopardy Clause that go beyond the interest of the defendant in the identity of a tribunal or his interest against

proceedings that allow a prosecutor an opportunity to improve on a previously presented case, and that a defendant's interest against protraction may be infringed even when the latter two interests are not.

The O'Keefe court was not alone in recognizing the interest against protraction that the Clause, protects. In Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 707 (1978), the United States Supreme Court stated:

> [T]he constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." [Footnote omitted.] The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and

> may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. [Emphasis added; footnote omitted.] [Id. at 503-504, 98 S. Ct. at 829-30, 54 L. Ed. 2d at 727.]

Similar observations appear in Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [Emphasis added.] [Id. at 187-88, 78 S. Ct. at 223, 2 L. Ed. 2d at 204.]

And, in United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971), the Supreme Court stated:

> Society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. [Id. at 479, 91 S. Ct. at 554, 27 L. Ed. 2d at 553 (1971).

One commentator has suggested that the interest against protraction is the real interest underlying the interest in the identity of the tribunal:

> A defendant has a valued right to have his trial completed by a particular tribunal, not because he has a constitutional interest in the identity of any particular tribunal, but because he has an interest in being able "to conclude his confrontation with society" [footnote omitted] once it has begun. Once a trial begins, a defendant has a legitimate interest in getting the trial over with "once and for all." [Footnote omitted.] It follows, therefore, that he also has an interest in continuing with "the first jury" [footnote omitted] impaneled in the case because changing the jury means interrupting the trial. To that extent, the defendant's interest

> in retaining the particular tribunal with which he began is merely an incident of his primary interest in being able to complete the trial itself. [Westen and Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review 81, 90; emphasis added.]

While the U.S. Supreme Court has resisted any erosion of a defendant's interest in the identity of the tribunal, in Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978), they made clear that the interest was not the only one protected by the Clause, stating:

> [Double jeopardy] concerns -- the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury -- have combined to produce the federal law that in a jury trial jeopardy attaches when the jury is empaneled and sworn. [Id. at 38, 98 S. Ct. at 2162, 57 L. Ed. 2d at 33.]

I believe that the concerns protected by the Clause have a dignity of their own;

it is not only those threatened proceedings that give a prosecutor a chance to improve a prior performance that subject a defendant to "embarrassment, expense and ordeal" and inflict a "continuing state of anxiety and insecurity" upon a defendant. A second jeopardy need not involve a different tribunal to be a "harrowing experience" and an occasion of "heavy personal strain." Nor is any special showing of a probability of the conviction of an innocent defendant required for valid double jeopardy claim; we recognized in Commonwealth v. Bolden, 472 Pa. 602, 373 A. 2d 90 (1977), the right involved is not only a right not to be convicted unjustly following the termination of the initial jeopardy but a right not to be tried at all.

The consequence of recognition of the double jeopardy implications of protracted recesses is not their absolute preclusion -- there may be occasions when a lengthy recess presents a reasonable alternative to an ordinary mistrial -- but their exposure to scrutiny for manifest necessity. Instantly, manifest necessity was non-existent. To the contrary, the ten-year delay here was caused by the Commonwealth's stubborn insistence on multiple appeals and proceedings all to the detriment of Appellant's right to a prompt and speedy trial.

It will be remembered that the remaining charges here were stayed pending the Commonwealth's appeal of the order sustaining the demurrers. The Superior Court quashed the appeal and held that the principles of double jeopardy barred the Commonwealth from appealing an order

sustaining a demurrer to the evidence. Commonwealth v. Smalis, 331 Pa. Superior Ct. 307, 480 A. 2d 1046 (1984). The Commonwealth appealed to this Court and we reversed the Superior Court and remanded with instructions to the Superior Court to pass upon the merits of the demurrer ruling entered by the trial court. Commonwealth v. Zoller, 507 Pa. 344, 490 A. 2d 394 (1985). Appellant petitioned the United States Supreme Court for a writ of certiorari, which was granted. The United States Supreme Court agreed with the Superior Court and held that the Commonwealth's initial appeal of the demurrers was barred by double jeopardy and reversed this Court. Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). In accordance with this mandate, we entered a per curiam order vacating our previous

order and reinstating the order of the Superior Court which quashed the Commonwealth's appeal. Our per curiam order was filed on July 29, 1986; the trial in this case had commenced on or about November 12, 1980.

At this point, the Commonwealth sought to resume trial on the remaining charges of involuntary manslaughter, reckless endangerment, failure to prevent a catastrophe and theft by deception. Appellant filed a motion to dismiss these charges on double jeopardy, due process and confrontation clause grounds. The Superior Court, utilizing primarily a speedy trial analysis, affirmed the trial court's denial of the motion to dismiss and remanded the case to the trial court for further proceedings. This appeal followed.

The Commonwealth took a calculated gamble on appeal and delay and they lost. There was no manifest necessity to this course of action. The Commonwealth cannot ignore the consequences for double jeopardy purposes of their freely chosen acts.

Moreover, the interest against multiple prosecutions may also be infringed (as here) by permitting a trial to be bifurcated by an appeal. In United States v. Jaramillo, 510 F.2d 808 (8th Cir. 1975), the court stated:

> [Resumption of the non-jury trial] would subject the appellees to the same hazards incurred in a second trial that are clearly prohibited by the double jeopardy clause. The remand would provide the government with another chance to convict the appellees by exhaustively reviewing the record, marshaling the facts and rearguing the case in a manner not previously presented. The appellees would be put to further expense, ordeal, and

anxiety. [Id. at 812; emphasis added.]

While it might be argued that applying the double jeopardy clause here would be retroactive and hence unfair to the Commonwealth because the Commonwealth relied on a procedure presumably valid at the time, that argument should be rejected. The cases dealing with issues of retroactive application of double jeopardy law have consistently held double jeopardy decisions to be retroactive notwithstanding prosecutorial reliance on prior standards. Robinson v. Neil, 409 U.S. 505, 93 S. Ct. 876, 35 L. Ed. 2d 29 (1973); Vogel v. Commonwealth of Pennsylvania, 790 F.2d 368 (3rd Cir. 1986); Commonwealth v. Richbourg, 442 Pa. 147, 275 A. 2d 345 (1971).

In short, I have concluded that constitutional standards enunciated under

the Double Jeopardy Clause preclude further proceedings in this case. Simply because the instant facts do not fit neatly into previously existing categories is no reason not to find a constitutional violation where fundamental constitutional policies are impinged. The delay here was too long to allow us in any but a mechanical and overly technical way to conclude that initial jeopardy continued. The facts speak otherwise. It would be patently unfair to subject Appellant to further trial at this point.

The unfairness of subjecting Appellant to further trial here also, it seems to me, rises to the level of a due process violation by violating the Confrontation Clause of the Fifth Amendment. See, Commonwealth v. Zoller, 507 Pa. 344, 490 A. 2d 394 (1985). The issue of the effect of the lapse of time

on the ability of the factfinder to decide the case on the basis that the Constitution contemplates -- that is to say, on live testimony -- has been ignored by the majority.

This court previously held that the action of a defendant in demurring to the evidence was an "election" that removed any double jeopardy barrier to further proceedings, Commonwealth v. Zoller, supra, but nonetheless we rejected the suggestion that resumption of trial was an appropriate procedure, and remanded the companion case, which was also non-jury, for a new trial, stating:

> We stated in [Wimberly, supra] that "[i]n those cases where this Court has concluded that a demurrer was granted in error, we have remanded for a new trial." Id.
>
> Accordingly, we reverse the Superior Court and remand Commonwealth v. Zoller, supra, where it was determined that the

> demurrer was granted in error, for a new trial. With regards to Commonwealth v. Smalis, supra, we remand to the Superior Court to pass upon the merits of the demurrer ruling entered by the trial court. [Id. at 359, 490 A. 2d at 402; footnote omitted.]

It is implicit from the foregoing that this Court found resumption of a non-jury trial after a "recess" for an appeal objectionable for some reason independent of double jeopardy considerations, and Appellant cogently argues that the reason is that this Court recognized that the Confrontation Clause contemplates that a verdict will be rendered at a time when the confrontation it promises the defendant will be fresh in the mind of the factfinder, and does not countenance a separation of several years between the confrontation and the deliberations that produce the verdict. In Jaramillo, supra, the court, after holding that the

resumption proposed there was as offensive to the Double Jeopardy Clause as retrial, went on to point out that resumption would impair other constitutionally protected interests of the defendant:

> Even if the same trial judge were available on remand, there is nothing to assure that the passage of time and the resultant dimming of the memory will not adversely affect the rights of the appellees. [Id. at 512.]

The concerns expressed by the Jaramillo court are at least equally applicable to the instant case, particularly since this case involved 53 witnesses whose testimony consumed some 2,000 transcript pages over a period of four weeks. A conviction based on a record as voluminous and as stale as the instant one would deprive Appellant of due process of law.

I would dismiss the remaining charges against Appellant.

Mr. Justice Larsen joins this Dissenting Opinion.